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Substantive Environmental Rights in the EU: Doomed to Disappoint?

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*I am grateful to those present at the Lund conference for comments.

Introduction

As an EU citizen, do I have a right to clean drinking water? Or do I have a right to be free from significant pollution? These are both substantive environmental rights, entitling me to a given level of environmental quality. The answer to both questions is probably 'yes', but the real issue is, in the first example, whether this kind of explicit rights framing has been particularly visible and, in the second, the extent to which this right is ever likely to be practically enforced in a specifically EU context. Post-Aarhus, we have seen the rise and rise of procedural environmental rights in the EU. While their substantive cousins exist in theory, they have remained very much in the shadows as far as use by the environmental movement is concerned. The aim of the current chapter is to explore this puzzle. I examine the current status of substantive EU environmental rights and seek to explain why it is that a potentially salient group of rights has failed to fulfil its promise. In the case of *legislative* substantive rights, I argue that the lack of a juridical need for a right within direct effect is a key factor and, with *fundamental* substantive rights, that it is a feature of both redundancy and restrictive precedent.

Environmental Rights

At the outset it is necessary to establish what is meant by 'environmental rights' in the context of the current chapter. In the wider literature and campaigning, the phrase is sometimes used to refer to rights enjoyed by, or on behalf of the environment itself. This may be termed an 'ecocentric' approach. However, more common in terms of judicial practice is for environmental rights to take the form of rights to a clean or healthy environment. These are anthropocentric rather than ecocentric rights because the relevant right is reserved for humans. While the environment may benefit *indirectly* from the enforcement of such rights, the environment itself has no standing under such an approach – only humans have a right to a clean or healthy environment. Such rights may be explicitly expressed in this way, for example in a national constitution. Thus the constitution of Hungary states in Article 21 that 'Hungary shall recognise and enforce the right of every person to a healthy environment.' Alternatively, as in the case of the European Convention on Human Rights (ECHR), the rights to a healthy environment may be 'derived' rights, whereby newer environmental rights are derived from the older, pre-existing rights already found within the Convention architecture, such as the right to life (Article 2) or the right to home and family life (Article 8).[1] The latter right under Article 8 is the most

[1] See generally: T Hayward, *Constitutional Environmental Rights* (Oxford, OUP, 2005).

highly developed and well known of the ECHR environmental rights and has been widely employed in severe pollution cases, where the European Court of Human Rights has often been persuaded that such pollution of the home amounts to an infringement of the right to home and family life.[2]

Substantive Versus Procedural Rights

The above rights to a clean and healthy environment – whether express or derived in nature – are a form of 'substantive' environmental right. There are also 'procedural' environmental rights. These involve not a right to a particular substantive environmental quality or outcome but, rather, to enjoy certain procedural rights in connection with the environment. Among the best known contemporary examples of such rights are those found in the UN/ECE Aarhus Convention on access to information, public participation in decision-making and access to justice in relation to the environment. The Convention provides for rights of access to environmental information, rights to participate in public decision-making on environmental matters and rights for the public to be able to gain access to the courts or other appropriate review procedures in cases involving the environment. The ECHR has also been used to create procedural environmental rights. Article 6, for example, which involves an obvious procedural right in the shape of a right to a hearing, has been used frequently in environmental cases. And even the otherwise more substantive-looking Articles 2 and 8, have, with Aarhus influence (considered further below), had procedural elements built into them.[3]

In Europe (both EU and ECHR), it is fair to say that while substantive environmental rights arrived on the scene first, procedural environmental rights have enjoyed a much more prominent role in recent years. It is beyond the scope of the current chapter to address the reasons for this procedural turn, but the entry into force of the Aarhus Convention in October 2001 has undoubtedly played a key part in it. Both the EU[4] and the ECHR[5] have been significantly affected by Aarhus.

While we now find ourselves in a situation where we have both substantive *and* procedural environmental rights, one might raise a question about whether the recent dominance of procedural rights is an altogether positive development.[6] Again, while this is beyond the scope of the current chapter, suffice it to say that although there are undoubtedly significant advantages associated with the new procedural rights, substantive environmental rights produce a much more direct 'hit' and are therefore likely to enjoy higher salience. A procedural right, if won, gives an individual or group the right to enter or use a procedure, which may or may not then produce the substantive result desired. The substantive result is, in other words, one stage removed or indirect. A substantive right, in contrast, provides direct access to the desired result in successful cases.

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[2] eg *Lopez Ostra v Spain* (1995) 20 EHRR 277; *Fadeyeva v Russia* (2007) 45 EHRR 10.
[3] A Boyle 'Human Rights or Environmental Rights? A Reassessment' (2007) 18 *Fordham Environmental Law Review* 471; C Hilson, 'Risk and the European Convention on Human Rights: Towards a New Approach' (2009) 11 *Cambridge Yearbook of European Legal Studies* 353; O Pedersen, 'The Ties that Bind: The Environment, the European Convention on Human Rights and the Rule of Law' (2010) 16 *European Public Law* 571.
[4] eg Council Decision 2005/370/EC on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental Matters [2005] OJ L124/1; Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to Community institutions and bodies [2006] OJ L264/13; Directive 2003/4/EC on public access to environmental information [2003] OJ L41/26; Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17.
[5] See Boyle (n 3); Hilson (n 3); Pedersen (n 3).
[6] Hayward (n 1).

Legislative Rights Versus Fundamental Rights

When considering substantive environmental rights, a final distinction needs to be drawn between legislative rights and fundamental rights because substantive environmental rights can be found in both categories. Legislative rights are those found mainly in EU Directives. Some, invariably procedural, environmental Directives employ the express language of rights in their provisions. For the majority however, rights can be viewed as correlatives in a Hohfeldian sense to the obligations or duties owed by Member States to citizens under those Directives.[7]

Fundamental EU environmental rights consist of those in the EU Charter of Fundamental Rights, those found in, or derived from, the ECHR (with the latter, the Court will have absorbed them into its own internal doctrine of fundamental rights as part of the 'general principles of law') and, finally, rights derived from national constitutions. As de Sadeleer has observed of ECHR-related rights: 'although EU law does not specify a self-executing right to environmental protection, such a right emerges in the wake of fundamental rights enshrined by the ECHR.'[8] These ECHR rights include both substantive rights under, for example, Article 8 (home and family life) and Article 2 (right to life) and procedural rights under, for example, Article 6 (right to a fair trial) and Article 8 again. ECHR jurisprudence on environmental rights is now substantial, and includes cases ranging from airport noise (*Hatton*),[9] pollution risks from coal fired power stations (*Okyay*)[10] and gold mines (*Taşkin*),[11] through to failures to provide warnings about risk (*Guerra*, *Budayeva*).[12] However, the CJEU has studiously avoided referencing any ECHR environmental case law in its own judgments. While there are some references to ECHR articles like articles 6, 8 and 13 by Advocates General or by parties,[13] the Court itself does not currently tend to frame its environment-related judgments in Convention terms.[14] If it mentions rights, this will typically only be the Charter or existing EU general principles of law.

As regards the EU Charter of Fundamental Rights, although it contains an explicit environmental article, this is expressed more as a programmatic principle than a judicially enforceable right. Article 37 states:

> A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

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[7] C Hilson and T Downes, 'Making Sense of Rights: Community Rights in E.C. Law' (1999) 24 *EL Rev* 121.
[8] N de Sadeleer, *EU Environmental Law and the Internal Market* (Oxford, OUP, 2014). See also F Ermacora, 'The Right to a Clean Environment in the Constitution of the European Union' in J Jans (ed), *The European Convention and the Future of European Environmental Law* (Groningen, Europa Law Publishing, 2003); and S de Abreu Ferreira, 'Fundamental Environmental Rights in EU Law: An Analysis of the Right of Access to Environmental Information' in D Pavlich (ed), *Managing Environmental Justice* (Amsterdam, Rodopi, 2010).
[9] *Hatton v UK* (2003) 37 EHRR 28.
[10] *Okyay and Others v Turkey* (2006) 43 EHRR 37.
[11] *Taşkin and Others v Turkey* (2006) 42 EHRR 50.
[12] *Guerra v Italy* (1998) 26 EHRR 357; *Budayeva and Others v Russia* (2014) 59 EHRR 2.
[13] eg Case C-583/11 P *Inuit Tapiriit Kanatami* [2014] 1 CMLR 54; Case C‑28/09 *Commission v Austria*, EU:C:2011:854; Case C-463/11 *L v M* [2013] Env LR 35.
[14] See eg *Commission v Austria* (n 13). Although eg art 8 ECHR was raised as a justification by Austria in the case for its trans-Alpine lorry restrictions (paras 83, 118), the Court does not mention art 8. *Cf earlier* case law where, in Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659, the Court did refer to arts 10 and 11 of the ECHR on freedom of expression and assembly in constructing fundamental rights as a potential justification for restriction on free movement of goods caused by an environmental anti-motorway protest.

Although Article 37 may be legally justiciable in limited circumstances,[15] this will be as a principle rather than a right, with the Charter making a narrow distinction between the two.[16] This does not mean that environmental rights do not exist under the Charter. They do, but it is simply that, as with the development of ECHR jurisprudence on the environment, the Charter's environmental rights (which broadly mirror the equivalent ECHR rights) are 'derived' rights based on other rights in the Charter such as the right to life in Article 2, the right to private and family life in Article 7 and the right to property in Article 17. Again, as with the ECHR above, the Charter-based fundamental rights may be substantive or procedural in nature, with the right to property an example of the former and the Article 47 right to an effective remedy and fair trial an obvious example of the latter.

As for national constitutional provisions, these have only ever been referenced by Advocates General and then only in passing as a whole (as 'national constitutional traditions') rather than a mention of specific national constitutions.[17] Even there, these are not the environment-specific substantive constitutional traditions being cited (eg Article 21 of the Hungarian constitution, mentioned earlier), but rather procedural ones like the right to effective judicial protection.[18]

Legislative Rights

Much of the early interest and controversy surrounding EU environmental rights involved the Hohfeldian legislative type, where, rather than being expressly stated, the right was a correlative to a Member State obligation set out in an environmental directive. These are what one might call 'silent' rights and the case law falls into three categories: incorrect transposition; direct effect; and state liability.

Incorrect Transposition

The incorrect transposition case-law involves Member States failing to transpose Directives into national law in a form which provides sufficient legal certainty to enable individuals to enforce them in national courts. The first Court of Justice case of this type involved Directive 77/452 on Nursing Qualifications,[19] with the Court stating that 'where the directive is intended to create rights for individuals, the legal position arising from those principles [must be] sufficiently precise and clear [so that] the persons concerned are made fully aware of their rights and, where appropriate, afforded the possibility of relying on them before the national courts.'[20] In the two following environmental cases involving the Wild Birds Directive 79/409,[21] the Court made no mention at all of rights, emphasising instead that faithful transposition is 'particularly important in a case where the management of the common heritage is entrusted to the Member States'.[22] The Court was obviously reluctant to refer back to the Nursing case and its rights formulation here in a nature conservation context. To suggest

[15] S Bogojević, 'EU Human Rights Law and Environmental Protection: The Beginning of a Beautiful Friendship?' in S Douglas-Scott and N Hatzis (eds), *EU Human Rights Law* (Cheltenham, Edward Elgar, 2015); de Sadeleer (n 8).
[16] C Hilson 'Rights and Principles in EU law: A Distinction Without Foundation?' (2008) 15 *Maastricht Journal of European and Comparative Law* 193; de Sadeleer (n 8).
[17] *L v M* (n 13) AG Wathelet.
[18] ibid.
[19] [1977] OJ L176/1.
[20] Case 29/84 *Commission v Germany* [1985] ECR 1661 [23].
[21] [1979] OJ L103/1. After amendment, this subsequently became Directive 2009/147/EC [2010] OJ L20/7.
[22] Case C-339/87 *Commission v Netherlands* [1990] I-851 [28]; Case 252/85 *Commission v France* [1988] ECR 2243 [5]. The Court has kept this formulation for the Birds Directive to this day: see eg Case 247/85 *Commission v Belgium* [1987] ECR 3029 [9]; Case C-38/99 *Commission v France* [2000] ECR I-10941 [53]; Case C-60/05 *WWF Italia and Others v Regione Lombardia* [2006] ECR I-5083 [24]; Case C-418/04 *Commission v Ireland* [2007] ECR I-10947 [64], [159].

that such Directives confer rights on individuals would have been possible, though more ecocentric than one might expect from the Court. However, in the subsequent cases – involving environmental directives with no express rights contained within them – it found itself able to employ the rights wording. In a case involving the Groundwater Directive 80/68/EEC,[23] the Court declared that the Directive conferred rights on individuals, making no link with public or human health at this stage.[24] However, thereafter, the Court did frequently make such a link, ruling that environmental directives which were designed to protect public health involved individual rights. Directives explicitly identified as such included the Surface Water for Drinking Directives 75/440/EEC[25] and 79/869/EEC,[26] the Lead in Air Directive 82/884/EEC,[27] the Fish and Shellfish Waters Directives 78/659/EEC[28] and 79/923/EEC,[29] and the Air quality (Sulphur Dioxide and Suspended Particulates) Directive 80/779/EEC.[30] Although this link between health and rights was frequent, it seems to have been confined to environmental directives involving *substantive* environmental quality. Thus in an incorrect transposition case involving the *procedural* Access to Environmental Information Directive 90/313/EEC,[31] the Court employed its standard rights framing even in the absence of a connection with health.[32] Of course in this case neither were the rights silent – express rights of access are at the core of that particular directive.[33]

Direct Effect

The Court of Justice of the EU has over the years moved to constitutionalise the EU treaties, emphasising that many of the obligations or duties owed by Member States in the Treaties and in legislation such as Directives create rights for citizens that are enforceable in their national courts. This forms the basis of the EU law doctrine of 'direct effect'. Back in the 1990s, there was a significant debate as to whether rights were a condition of direct effect or a consequence of it. Borrowing from the incorrect transposition case law, some suggested that rights were indeed a prior condition for direct effect and that such rights were limited to directives which were aimed at protecting human health.[34] There were of course some overlaps between incorrect transposition and direct effect – not least the emphasis by the Court in both on a need for clarity and precision (as a condition for direct effect and as a quality of transposition[35] respectively). However, the incorrect transposition case law is fundamentally about enabling individuals to rely on EU rights that have been

[23] [1980] OJ L20/43. Repealed by the Water Framework Directive 2000/60/EC [2000] OJ L327/1.
[24] Case C-131/88 *Commission v Germany* [1991] ECR I-825.
[25] [1975] OJ L194/26.
[26] [1979] OJ L271/44. Case C-58/89 *Commission v Germany* [1991] I-4983.
[27] Case C-59/89 *Commission v Germany* [1991] ECR I-2607.
[28] [1978] OJ L222/1. Later consolidated into Directive 2006/44/EC [2006] OJ L264/20.
[29] [1979] OJ L281/47 (later consolidated into Directive 2006/113/EC [2006] OJ L376/14). Case C-298/95 *Commission v Germany* [1996] ECR I-6747.
[30] [1980] OJ L229/30 (subsequently repealed – see now Directive 2008/50/EC [2008] OJ L152/1. Case C-361/88 *Commission v Germany* [1991] ECR I-2567.
[31] [1990] OJ L158/56.
[32] Case C-217/97 *Commission v Germany* [1999] ECR I-5087, [31]-[32], [37]. See also Case C-530/11 *Commission v UK* [2014] 3 C.M.L.R. 6, [34]-[35] (which involved a challenge to UK judicial costs rules as incorrect transposition of Directive 2003/35/EC on public participation in decision-making and access to justice in environmental matters [2003] OJ L156/17); C-427/07 *Commission v Ireland* [2009] ECR I-6277, [54]-[56] (also involving Directive 2003/35/EC).
[33] Similarly for Cases C-530/11 and C-427/07 (n 32).
[34] See eg C Hilson, 'Community Rights in Environmental Law: Rhetoric or Reality' in J Holder (ed), *The Impact of EC Environmental Law in the United Kingdom* (Chichester, John Wiley & Sons, 1997).
[35] In Case C-361/88 *Commission v Germany* (n 30) the Court states: 'the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context may, depending on the content of the directive, be adequate for the purpose, *provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner* so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts' [15, emphasis added].

properly transposed into national law without needing to rely on them directly via direct effect (and, furthermore, the Court has also emphasised that the ability to invoke direct effect is no excuse for incorrect transposition[36]). And just because the Court had said that certain types of environmental directives confer rights for the purposes of incorrect transposition, does not mean that rights are a condition for direct effect and that direct effect is limited to, for example, environmental directives aimed at protecting human health. To make such a leap is, in Prechal and Hancher's terms, to engage in a form of 'conceptual pollution'.[37]

Hence, where an EU environmental directive is not intended to protect human health (but, say, to protect the ecological environment itself), it does not mean that it will not be enforceable at the suit of individuals or groups in national courts.[38] If the relevant provisions of such a directive satisfy the conditions which the Court has laid down for direct effect (that they be sufficiently clear, precise and unconditional[39]), then they will be enforceable. Enjoyment of a right is not itself a condition for direct effect.

However, the fact that rights turned out not to be a condition for direct effect is, I would argue, something of a double-edged sword. On the one hand it is of course an advantage that the scope of direct effect for environmental directives has not been limited by being restricted to a class of directives which confer rights on individuals. Nevertheless, on the other hand, it means that the currency of rights framing – which has been so powerful in other contexts such as civil and LGBT rights – has not had the opportunity to take hold in relation to substantive directives with silent rights. To illustrate this argument, one can take as examples two UK substantive cases decided around twenty years apart. The first is the 1994 Friends of the Earth (FoE) judicial review challenge of a UK government enforcement decision in relation to national legislation designed to implement the Drinking Water Directive.[40] Rights were pleaded[41] in the case itself,[42] no doubt in part because of the uncertainty about whether rights were a condition of direct effect or not. However, rights were hardly mentioned in associated FoE publicity surrounding the case. A letter to *The Times* newspaper from

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[36] Case 29/84 (n 20): 'In particular a Member State cannot rely on the direct effect of the principle of non-discrimination on grounds of nationality in order to evade the obligation to incorporate into domestic law a directive which is intended precisely to give that principle practical effect by facilitating the effective exercise of freedoms proclaimed in the Treaty' [21].

[37] Sacha Prechal and Leigh Hancher, 'Individual Environmental Rights: Conceptual Pollution in EU Environmental Law' (2002) 2 *Yearbook of European Environmental Law* 89.

[38] P Wennerås, *The Enforcement of EC Environmental Law* (Oxford, OUP, 2007).

[39] Even if the relevant provision does not satisfy the unconditionality requirement for direct effect (meaning there should be no discretion left to Member States by the provision), the environmental directive may still be legally mobilised in national courts. And that is because the Court of Justice has come up with a parallel legal doctrine to direct effect, which has been referred to as 'legality review' (C Hilson 'Legality Review of Member State Discretion Under Directives' in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century: Volume 1* (Oxford, Hart Publishing, 2004). Indeed, some commentators regard legality review as part and parcel of direct effect rather than a separate doctrine: S Prechal, 'Does Direct Effect Still Matter?' (2000) 37 *CML Rev* 1047; Wennerås (n 38); J Jans and H Vedder, *European Environmental Law After Lisbon* (Groningen, Europa, 2012). In essence, legality review allows for judicial review in national courts so that alleged abuses of Member State discretion under 'conditional' provisions of directives do not remain unchallengeable in the courts.

[40] *R v Secretary of State for the Environment, ex parte Friends of the Earth* [1994] 2 CMLR 760; and on appeal [1996] 1 CMLR 117.

[41] Albeit that this appears to have been a last-minute submission rather than a developed argument made orally or in writing. As Schieman J (as he then was) noted at first instance, 'The submission is not foreshadowed in the Form 86A and has not been the subject of detailed argument in front of me' [74].

[42] As Counsel for FoE argued at [72]-[74]: 'the Community citizen has had since 1985 a right under Community law to wholesome water; such a right must be enforceable. Under the Act the only method of enforcement at the hands of an individual is that provided by section 22 and this only arises once an enforcement order has been made. Therefore, by not making an enforcement order the Secretary of State deprives the individual of the possibility of enforcing his right under Community law.'

FoE's then water campaigner Liana Stupples does not mention a right to clean drinking water at all.[43] The FoE press release of 23 March 1994[44] does mention a right to clean and wholesome drinking water, but only once and on the second page. The main frame adopted is, rather, a 'polluter pays' one (with four explicit references and one implicit one).

Contrast this with the recent ClientEarth challenge to the UK government's inaction over air quality.[45] The case is the mirror image of FoE: there is no mention of rights in the legal judgments themselves[46] – no doubt because it is now clear that rights are not a condition of direct effect. Mention of the substantive right to air quality comes, instead, strongly emphasised in ClientEarth's publicity around the case. Thus its February 2014 press release begins with the statement that 'We believe that everyone has the right to breathe clean air. That's why we brought our successful air pollution case against the UK to the Supreme Court.'[47] CEO James Thornton is subsequently quoted as saying 'We have the right to breathe clean air and the government has a legal duty to protect us from air pollution.'[48] In an earlier press release commenting on the Supreme Court's call for an expedited hearing by the Court of Justice, ClientEarth lawyer Alan Andrews stated: 'We can't afford to wait for this case to grind its way through the courts. The longer these limits are broken, the more people will die. We need a landmark ruling on our right to clean air in 2013' before going on to comment 'We have a right to breathe clean air – this is another big step forward in making that right a reality.'[49] And the press release after the final 2015 Supreme Court victory similarly observed: 'The historic ruling is the culmination of a five year legal battle fought by ClientEarth for the right of British people to breathe clean air … Air pollution kills tens of thousands of people in this country every year. We brought our case because we have a right to breathe clean air and today the Supreme Court has upheld that right.'[50]

This is important socio-legally. Just because substantive legislative environmental rights are not juridically necessary for direct effect, does not mean that the campaigning power of explicit rights framing cannot be successfully employed outside court. To do the latter, one of course needs some idea of when it makes sense to marshal such claims. This inevitably takes us back to the case law on incorrect transposition (as well as the law on state liability and other recent Aarhus-related case-law, to be considered below) because the Court has conceptually wrestled with these ideas there. It clearly makes sense to employ extra-judicial rights framing in cases like ClientEarth, where the air quality directive was aimed at the substantive protection of human health. What then of possible extra-judicial rights framing in cases which are *not* intended to protect human health? It may be useful to draw a distinction here between directives which are aimed at providing a *substantive* level of environmental quality and those which are aimed at *procedural* environmental protection. In terms of framing it does not make sense for environmental social movement organisations like FoE or ClientEarth to employ a rights frame in media campaigning on substantive environmental provisions

[43] *The Times*, July 27, 1993.
[44] On file with the author.
[45] Culminating in the Supreme Court's judgment in *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28.
[46] Similarly, there is no mention of rights in the Court's previous ruling in Case C-237/07 *Janecek* [2008] ECR I-6221, which is the key precedent on air quality on which the ClientEarth case is based.
[47] ClientEarth, 'Illegal traffic pollution, the Queen and ClientEarth', 24 February 2014, available at www.clientearth.org/201402242456/news/latest-news/illegal-traffic-pollution-the-queen-and-clientearth-2456.
[48] ibid.
[49] ClientEarth, 'Supreme court calls on Europe to fast-track UK air pollution case', 17 July 2013, available at www.clientearth.org/201307172236/news/press-releases/supreme-court-calls-on-europe-to-fast-track-uk-air-pollution-case-2236.
[50] ClientEarth, 'UK Supreme Court orders Government to take "immediate action" on air pollution', 29 April 2015, available at www.clientearth.org/news/press-releases/uk-supreme-court-orders-government-to-take-immediate-action-on-air-pollution-2843.

which are not intended to protect human health. Thus, it may be a stretch to frame the Water Framework Directive in terms of a right to water quality of 'good' ecological status as required by the Directive.[51] This status is, after all, an ecological quality standard[52] and one would conceivably have to be arguing for an ecocentric environmental right for such a frame to fit.[53]

However, it makes more sense to adopt a rights frame in connection with many more obviously[54] procedural environmental directives.[55] This is self-evidently true of procedural directives, such as Directive 2003/4/EC on Access to Environmental Information, which use the explicit language of a right (of access to information) within the text. However, it is also true where a procedural environmental directive does not use the language of rights but rather sets out various obligations. Thus, with the Environmental Impact Assessment Directive 2011/92/EU for example, it is possible to conceive of the obligations it contains as creating procedural rights to an EIA which are enforceable in the national courts.[56] That may of course in part be because while EIA encompasses ecological issues, it also involves assessment of impacts on human health.[57] As recital 13 of the EIA Directive's preamble states, 'The effects of a project on the environment should be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life.' In fact the Court has framed the EIA Directive in rights terms without even explicitly linking this to health, as we shall see in the state liability section below.[58] In any event, the point is that on either basis (health-related or not), the EIA Directive clearly lends itself to extra-judicial rights framing.

State Liability

Although the enjoyment of an individual right is not a condition of direct effect, it is an explicit condition of state liability under *Francovich/Brasserie du Pecheur*.[59] In the context of such a damages claim in the *Leth*[60] case, the Court ruled that the EIA Directive:

> confers on the individuals concerned a right to have the effects on the environment of the project under examination assessed by the competent services.[61]

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[51] Which is not to say that the WFD does not lend itself to rights framing: other, procedural parts such as art 14 which provides for public information and consultation could easily be framed in rights terms.
[52] W Howarth, 'The Progression Towards Ecological Quality Standards' (2006) 18 *Journal of Environmental Law* 3.
[53] *Cf* Case C‑240/09 *Lesoochranárske zoskupenie VLK* [2011] ECR I-1255: 'In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in this case the Habitats Directive, since the Member States are responsible for ensuring that those rights are effectively protected in each case' [47]. However, this is more in the nature of a procedural right to invoke the Directive rather than expressing that the Directive confers substantive rights as such.
[54] The WFD also has procedural elements (see n 51), but it is not uniquely procedural in nature (see further W Howarth, 'Aspirations and Realities under the Water Framework Directive: Proceduralisation, Participation and Practicalities' (2009) 21 *Journal of Environmental Law* 391).
[55] On EU legislative procedural environmental rights, see further Ole Pedersen, 'European Environmental Human Rights and Environmental Rights: A Long Time Coming?' (2008) 21 *Georgetown International Environmental Law Review* 73.
[56] de Sadeleer (n 8).
[57] Wennerås (n 38).
[58] See also ibid. AG Sharpston (Opinion in Case C-115/09 *Trianel* [2011] ECR I-3673, [38]-[40]) and de Sadeleer (n 8) correctly argue that a health element should not be required to enforce an environmental directive like the EIA in national courts; however, this is not the same as considering whether a rights frame makes sense and may be beneficial from a campaigning perspective in such cases. They argue the same for nature conservation cases, where, again in extra-judicial campaigning terms, a rights frame looks less apposite than for EIA (which has a dual purpose – environmental and human health).
[59] Case C-6/90 *Francovich v Italy* [1991] ECR I-5357; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029.
[60] Case C‑420/11 *Leth v Austria* [2013] 3 CMLR 2. For a useful blog account of the case, see Hans Vedder, European Law Blog, 27 March 2013, http://europeanlawblog.eu/?p=1630.

What is noticeable is that the Court did not make any connection with human health here. Thus, just as one should not draw conclusions for the case law on direct effect from the case law on incorrect transposition, so too one should be wary of drawing conclusions from the latter case law for the jurisprudence on state liability. In the event, although the applicant – whose house had lost value because of increased aircraft noise from an airport expansion at Vienna-Schwechat on which an EIA had not been conducted – satisfied the rights condition of state liability, they failed on the causation hurdle.[62] The fact that *Leth* remains the only environmental state liability claim heard by the Court[63] is almost certainly because the sufficiently serious breach and causation conditions are very difficult to satisfy in environmental cases.

Fundamental Rights

With fundamental environmental rights, although there were very few cases at all before 2009 when the Charter of Fundamental Rights became binding, since that time we have seen reasonably large numbers of cases involving *procedural* fundamental rights. In the *Inuit* case[64] for example, the Court ruled that Article 47 of the Charter (right to an effective remedy and to a fair trial) was not intended to change the system of judicial review laid down by the Treaties (including its restrictive rules on standing under challenge here). There are also a number of examples of cases involving *substantive* fundamental environmental rights. Thus in *Križan*[65] for example, a landfill site operator failed to show that the annulment of a permit by a national court on grounds of infringement of the IPPC Directive 96/61 was in itself an unlawful interference with its right to property in Article 17 of the Charter. However, the majority of these substantive fundamental environmental cases have, like *Križan*, been what one might characterise as anti-environmental cases brought by industry and involve property rights as the relevant substantive right. While there has been the occasional pro-environmental procedural fundamental rights claim – such as *R (Edwards) v Environment Agency*,[66] where the right to an effective remedy in article 47 of the Charter was said to support the requirement that the costs of bringing legal proceedings in domestic environmental cases should not be 'prohibitively expensive' – there have been no pro-environmental substantive fundamental rights claims brought by the individuals or environmental groups. How then do we account for that, on the face of it, surprising lack?

The first explanation is one of redundancy: there will often simply be no need to bring a claim based on a breach of EU substantive fundamental rights, because other legal avenues are much more likely to be followed instead. To appreciate this, one needs to set out the various possible types of environmental incidents and disputes that might arise. It will then be seen that very few of these are likely seriously to engage EU ECHR-derived general principles or equivalent Charter fundamental rights. First, there is the severe pollution incident type. This is the type of dispute which we know can

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[61] [44]. See also [32], which describes the right very much in Hohfeldian correlative terms: 'the Court has already ruled that an individual may, where appropriate, rely on the duty to carry out an environmental impact assessment under Article 2(1) of Directive 85/337, read in conjunction with Articles 1(2) and 4 thereof (see Case C‑201/02 *Wells* [2004] ECR I-723, para 61). That directive thus confers on the individuals concerned a right to have the environmental effects of the project under examination assessed by the competent services and to be consulted in that respect.'

[62] In principle, causation is for the national courts to determine; however the Court left little room for doubt here as to the chances of success.

[63] There is an example in the UK national courts – *Bowden v South West Water* [1998] Env LR 445 – involving a substantive legislative right under the Shellfish Waters Directive 79/923/EEC [1979] OJ L281/47 (since replaced by Directive 2006/113/EC [2006] OJ L376/14).

[64] n 13.

[65] Case C-416/10 *Križan* [2013] Env LR 28.

[66] Case C-260/11 *R (Edwards) v Environment Agency* [2013] 3 CMLR 18 [33].

trigger substantive ECHR fundamental rights in a European Convention context.[67] However, in an EU context, these incidents take place on the territory of Member States and most will involve obvious breaches of national law, typically with no real need to bring EU law into the equation. Where national law fails applicants in this type of severe pollution case, they take their cases to the European Court of Human Rights in Strasbourg for breaches of the ECHR, and not the CJEU in Luxembourg for breach of EU fundamental rights law.[68] Second, there is the type of case involving a challenge to national action (or inaction) which fails to comply with relevant EU environmental legislation. Here, there is again simply no need to rely on EU *fundamental* rights because applicants can avail themselves, much more straightforwardly, of EU *legislative* rights via legal doctrines such as direct effect or legality review (albeit, as we have seen, that these rights may not need to be pleaded in express rights terms).

Third, there is the type of case where an applicant wants to challenge an EU action or item of EU legislation, whether for being too strong (industry) or too weak (environmental movement actors). This type of case could well in theory involve reference to fundamental rights as a basis for such a challenge, but legal opportunity[69] is poor in practice for two reasons. One reason is a lack of standing before the CJEU (restrictive for both environmental interests and industry) – in other words an inability for an applicant to gain access to the Court. The restrictive legacy of the *Plaumann*[70] case has cast a long shadow. It is, however, possible to make such challenges in the national courts instead and not be faced with this standing hurdle at EU level. *Standley*[71] provides a good example of such a case, with farmers challenging the Nitrates Directive 91/676/EEC[72] in the UK national courts. The other reason is more to do with restrictive precedent or poor 'legal stock' as an aspect of legal opportunity.[73] In essence, ECHR case law does not come to the assistance of claimants who are arguing that future risks pose a threat. For ECHR rights to be triggered, the relevant risk must be imminent.[74] And of course in most cases where an environmental NGO might be mounting a substantive challenge to weak EU environmental action, it will be on the basis that the EU is not doing enough to address a non-imminent, future risk. *Standley*, in contrast, was a substantive industry challenger – and such litigants will almost invariably (though, as in *Standley*, typically unsuccessfully) be claiming in national courts that what they perceive as excessively strong national environmental regulation is based on parent EU legislation which is unlawful because it breaches their fundamental right to property.

Finally, there are environmental protest cases like *Schmidberger*[75] or, to take a UK national court example, the Scottish case *Cairn Energy v Greenpeace*.[76] Cairn Energy was seeking an interdict (injunction) against Greenpeace International in relation to direct action occupation of Cairn's offices in Edinburgh. Part of Greenpeace's legal argument was that an interdict would interfere with

[67] eg *Lopez Ostra* and *Fadeyeva* (n 2).
[68] The current paper concerns EU law; however, it is worth noting that environmental social movement *organisations* are typically invisible within the European Convention system, even if environmental rights themselves are not, because of restrictions on standing faced by groups (with the inability to show that they are 'victims') – see further C Schall, 'Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?' (2008) 20 *Journal of Environmental Law* 417.
[69] See C Hilson, 'New Social Movements: The Role of Legal Opportunity' (2002) 9 *Journal of European Public Policy* 238.
[70] Case 25/62 *Plaumann v Commission* [1963] ECR 95.
[71] Case C-293/97 *Standley* [1999] ECR I-2603.
[72] [1991] OJ L375/1.
[73] E Andersen, *Out of the Closets and Into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (Ann Arbor, University of Michigan Press, 2005); L Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (Cambridge, Cambridge University Press, 2011).
[74] Hilson (n 3); de Sadeleer (n 8).
[75] n 14.
[76] [2013] CSOH 50; [2013] SLT 570.

fundamental rights to freedom of expression and information and to freedom of assembly and association under Articles 10 and 11 of the ECHR and Articles 11 and 12 of the EU Charter of Fundamental Rights. The case itself does not take one very far: this is in part because the judge dismissed the interdict on other grounds and hence did not consider the rights point beyond an *obiter* mention; and partly because it is hard to assess whether the case did indeed fall within the scope of EU law to make the Charter applicable in any event. However, it is of course likely that future environmental protest cases will engage Charter rights, just as past cases like *Schmidberger* have engaged ECHR fundamental rights.[77] This type of case, in other words, is likely to be an exception in visibility terms: in comparison with the previous three case scenarios cited above where EU fundamental environmental rights are unlikely to get a hearing, in the protest scenario they are much more likely to be made visible. That said, this is only ever likely to be in the context of reactive rather than proactive litigation on the part of the environment movement:[78] in other words, as in both *Cairn Energy* and *Schmidberger*, it was not the environment movement itself bringing the claim but, rather, a company under pressure from the movement, with protest rights (to free expression and assembly) employed as a defence by the latter.

Conclusion

That procedural rights have become highly visible is no surprise, given the Aarhus-isation of EU environmental law over the last decade or so. However, given the powerful language of rights, one might perhaps have expected the environmental movement to have brought more rights-based claims to substantive environmental quality than we have seen. Such cases – in relation to both legislative rights and fundamental rights – have been thin on the ground.

I argued that the explanation for this puzzle could be found, in the case of legislative substantive rights, in the lack of a juridical need for a right within direct effect and the steep barrier posed by the other conditions for state liability which have left its rights promise underdeveloped as a result. In the case of fundamental substantive rights, I suggested that it was a feature of both redundancy and restrictive precedent. Either (in eg severe pollution cases) there is simply no need to bring cases within an EU framework because there are other more obvious avenues available to those who have suffered potential rights breaches, or (with eg challenges to legislation) the law on fundamental rights does not lend itself to environment movement challenges in the same way as it does to industry.

It remains to be seen whether this situation might change. The recent UK ClientEarth use of rights framing, albeit extra-judicially in its publicity rather than in the legal proceedings themselves, provides some hope that substantive EU environmental rights may yet have a brighter future.[79]

[77] Because of eg a threat to free movement caused by the protest activity as in *Schmidberger*.
[78] C Harlow and R Rawlings, *Pressure Through Law* (Abingdon, Routledge, 1992); Vanhala (n 73); C Hilson, 'UK Climate Change Litigation: Between Hard and Soft Framing' in S Farrall, T Ahmed, and D French (eds), *Criminological and Legal Consequences of Climate Change* (Oxford, Hart Publishing, 2012).
[79] Although, depending on the outcome of the UK Brexit negotiations, perhaps not in the UK.